UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WASHINGTON TOXICS COALITION, NORTHWEST COALITION FOR ALTERNATIVES TO PESTICIDES, PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS, and INSTITUTE FOR FISHERIES RESOURCES,

Plaintiffs,

v.

ENVIRONMENTAL PROTECTION AGENCY, and MIKE LEAVITT, ADMINISTRATOR,

Defendants,

v.

AMERICAN CROP PROTECTION ASSOCIATION, et al.,

Intervenor-Defendants.

CASE NO. C01-0132C

ORDER

This matter comes before the Court on Intervenor-Defendant CropLife America's ("CropLife") Motion for Stay Pending Appeal (Dkt. No. 241) and Intervenor-Defendants Washington State Farm Bureau and Washington State Potato Commission's (hereinafter collectively called "WSFB") Motion to

Stay and Modify the January 22, 2004 Order Awarding Injunctive Relief Pending Appeal (Dkt. No. 252). Having considered the papers submitted by the parties in support of and in opposition to the above motions, the Court finds and rules as follows.

I. PERTINENT PROCEDURAL HISTORY

On July 2, 2002, the Court declared that Defendant Environmental Protection Agency ("EPA") violated § 7(a)(2) of the Endangered Species Act ("ESA") by failing to initiate ESA-required consultations with the National Marine Fisheries Service ("NMFS")[1] regarding the effect of fifty-four EPA-registered pesticide active ingredients on more than twenty-five evolutionary significant units ("ESU") of threatened and endangered salmon and steelhead (hereinafter collectively called "salmonids"). (*See* July 2, 2002 Order at 15, Dkt. No. 73.) The Court ordered EPA to initiate and complete § 7(a)(2) consultations by December 1, 2004, in accordance with a schedule proposed by EPA. (*Id.* at 17-18.) In declaring EPA liabile for not complying with the ESA, the Court made the following findings of fact and conclusions of law with respect to Plaintiffs' claim for violation of § 7(a)(2): (1) Plaintiffs' claims were properly brought pursuant to the ESA citizen-suit provision, 16 U.S.C. § 1540(g)(1)(A); (2) the Administrative Procedures Act ("APA") and the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), including doctrines peculiar to those statutes, did not govern Plaintiffs' claims; (3) each pesticide active ingredient's EPA-registration constituted an ongoing agency action for the purposes of § 7(a)(2); (4) Plaintiffs' claims did not constitute an impermissible programmatic challenge to EPA's administration of FIFRA in the context of the ESA; (5) Plaintiffs had standing to challenge EPA's actions with respect to fifty-five pesticide active ingredients; and (6) EPA's own reports documented the potentially significant risks posed by registered pesticides to threatened and endangered salmonids and their habitat.

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[1] NMFS's official name has recently been changed to NOAA Fisheries. However, to preserve consistency in referring to agencies involved in the subject matter of the current dispute, this Order will continue to call NOAA Fisheries "NMFS."

On July 16, 2003, the Court ruled that EPA's violation of § 7(a)(2) entitled Plaintiffs to interim injunctive relief with respect to fifty-four ongoing EPA actions pending the agency's compliance with § 7(a)(2). The Court endorsed Plaintiffs' proposed requirement that ground and aerial application of each of fifty-four pesticide active ingredients for which EPA has not initiated consultation with NMFS or has not determined that the ingredient would not adversely affect salmonids should not occur within a certain distance from the salmonid-supporting streams. Relying on declarations of all parties' experts, EPA risk assessment, prior EPA consultations, and an EPA experts' § 7(a)(2) recommendations, the Court found that establishing the requested buffer zones would substantially contribute to the prevention of jeopardy to threatened and endangered salmonids. Based on the overwhelming weight of the precedent in the Ninth Circuit, the Court concluded that because EPA committed a substantial procedural violation of § 7(a)(2), traditional standards for injunctive relief did not apply in this case and Plaintiffs were entitled to such relief unless Defendants demonstrated that EPA's authorization of use of the pesticide active ingredients in question did not jeopardize salmonids. The Court found that while Defendants failed to introduce sufficient evidence of non-jeopardy, Plaintiffs submitted adequate proof to the contrary. However, in an abundance of caution, the Court scheduled oral argument with respect to the size of the pesticide application buffer zones requested by Plaintiffs.

On August 8, 2003, the Court issued a supplemental order further explaining its reasons for granting Plaintiff interim injunctive relief and specifying the issues to be discussed during the oral argument. The Court's order contained the following conclusions: (1) the remedy for a substantial procedural violation of § 7(a)(2) must be injunctive relief pending completion of EPA's consultation process with NMFS; (2) the injunctive relief was appropriate even if EPA's approval and registration of the pesticide active ingredients in question were ongoing; (3) Plaintiffs were not required to exhaust administrative remedies available pursuant to the FIFRA because the ESA provides an independent statutory basis for injunctive relief with respect to ongoing agency actions if the agency commits a substantial procedural violationof § 7(a)(2); and (4) although the Court did not find that EPA violated

substantive provisions of the ESA, given that EPA's procedural violation of § 7(a)(2) was substantial, the limited interim injunctive relief of EPA's ongoing approval and registration of pesticide active ingredients was necessary to fulfill "substantive, institutionalized caution mandate of the ESA." (August 8, 2003 Order at 5, Dkt. No. 159.) The Court again reiterated that under Ninth Circuit case law, irreparable injury to endangered species is presumed upon a finding of a substantial procedural violation of the ESA. Moreover, the Court examined and confirmed its prior conclusion that Defendants have failed to demonstrate the non-jeopardizing nature of EPA's ongoing actions in question. At the same time, the Court found that although Plaintiffs did not bear the burden of proving the pesticide active ingredients' adverse effect on salmonids, Plaintiffs nevertheless submitted evidence demonstrating potential existence of such substantial harm. Accordingly, the Court reaffirmed its decision to grant Plaintiffs interim injunctive relief in the form of establishing mandatory pesticide application buffer zones which, according to EPA experts and a 1989 biological opinion issued by the Fish and Wildlife Service ("FWS"), constituted a simple and effective preventive measure.

On August 14, 2003, the Court heard oral arguments presented by the parties' counsel and directed the parties to submit a joint proposed order mandating adequate buffer zones for applications of pesticide active ingredients. The Court patiently waited while the parties were attempting to resolve their disagreements with respect to the scope of the injunctive relief. By December 29, 2003, the parties filed with the Court several proposals and mutual objections thereto. Based on the parties' submissions and the Court's earlier findings of fact and conclusions of law, on January 22, 2004, the Court issued an order setting forth in great detail the scope of the interim injunction it had previously granted. Intervenor-Defendants, who have appealed the Court's order to the Ninth Circuit, now seek stay of the injunction until the Ninth Circuit resolves their appeal.

II. ANALYSIS

"An applicant for a stay [pending appeal] bears a heavy burden of persuasion." *Graddick v. Newman*, 453 U.S. 928, 933 (1981). The Ninth Circuit has held that in order to succeed on such a

motion, the moving party has to carry a burden similar to one that a litigant must satisfy to obtain a preliminary injunction. *See Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir. 1983); *Tribal Village of Akutan v. Hodel*, 859 F.2d 662, 663 (9th Cir. 1988). Normally, a preliminary injunction is warranted if the moving party demonstrates "either (1) a combination of probable success on the merits and the possibility of irreparable injury or (2) that serious questions are raised and the balance of hardships tips in its favor." *United States v. Nutri-Cology, Inc.*, 982 F.2d 394, 397 (9th Cir. 1992) (citations omitted). These two tests are not separate and mutually exclusive, but rather represent "the outer reaches of a single continuum." *Int'l Jensen, Inc. v. Metrosound U.S.A., Inc.*, 4 F.3d 819, 822 (9th Cir. 1993) (citation omitted). The Court concludes that the arguments propounded in Intervenor-Defendants' current motions do not reach any part of that continuum.

First, in support of the allegation that they will prevail on the merits of the appeal or, alternatively, that they have raised serious questions with respect to the substance of their appellate challenge, Intervenor-Defendants merely reiterate legal arguments that the Court already considered and rejected in its July 2, 2002, July 16, 2003, and August 8, 2003 orders.[2] The Court holds a firm conviction that it has correctly applied the relevant legal principles in granting Plaintiffs the injunctive relief at issue. The Court also believes that it acted well within the proper range of its discretionary powers in establishing the scope of that interim relief. As one federal court wisely noted, "a motion for stay pending appeal is not a second bite at the preliminary injunction apple." *Coalition for Econ. Equity v. Wilson*, No. C96-4024TEH, 1997 WL 70641 (N.D. Cal. Feb. 7, 1997). Thus, the Court will not entertain Intervenor-Defendants' recycled legal arguments.

Second, Intervenor-Defendants have not demonstrated that they will suffer an irreparable injury if

[2] In particular, CropLife argues that the Court erred in granting Plaintiffs interim injunctive relief because (1) this matter should be governed by restrictive APA provisions, (2) the Court should have reviewed the pertinent administrative record, and (3) the injunction is precluded by and contravenes various provisions of the FIFRA.

the Court does not stay the injunction pending resolution of Defendants' appeal. Intervenor-Defendants make a lengthy allegation that the Court-ordered interim injunctive relief will irreparably harm their private business and economic interests because they "manufacture, distribute, sell, [and] rely upon the pesticide products subject to the injunction." (CropLife's Mot. at 20-22; *see also* WSFB's Mot. at 13-30.) Intervenor-Defendants' motions are replete with estimates of the projected lost profits they and other members of the agricultural industry will allegedly suffer because of the inability to apply pesticide active ingredients subject to the injunction within the Court-established buffer zones. However, as the Court explained in granting Plaintiffs' motion for interim injunctive relief, "[t]he potential economic impacts proffered by [Intervenor-Defendants] are not relevant to the issues presently before the Court." (August 8, 2003 Order at 1 n.1 (citing relevant Ninth Circuit case law).) Accordingly, without considering whether Intervenor-Defendants' evidence of economic harm is otherwise admissible, the Court finds it to be irrelevant to the current analysis of the necessity to stay the injunction.[3]

On a closely related matter, Intervenor-Defendants have not overcome the ESA's embedded presumption that in cases involving violations of the Act, the balance of hardships always tips sharply in favor of endangered and threatened species. *See, e.g.*, *Marbled Murrelet v. Babbitt*, 83 F.3d 1068, 1073 (9th Cir. 1996). The Ninth Circuit has held that based on congressional intent in enacting the ESA, an agency's failure to comply with the statute's procedural requirements raises a presumption of irreparable harm to the endangered species. *See Sierra Club v. Marsh*, 816 F.2d 1376, 1383-84 (9th Cir. 1987).

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[3] The Court also notes that in alleging irreparable economic harm, Intervenor-Defendants repeat their attempt to characterize the Court's ordered interim injunction as unjustly victimizing the agricultural industry. This characterization both misapprehends the true meaning of the Court's January 22, 2004 Order and puts the blame in restricting the use of pesticide active ingredients on the wrong branch of the government. The Court did not enjoin application of pesticide-containing products by individual farmers or agricultural business entities; to the contrary, the Court enjoined *EPA* from authorizing unlimited use of such products based on EPA's failure to comply with § 7(a)(2) mandatory consultation requirements. (*See* January 22, 2004 Order at 5-8, Dkt. No. 224.) The need for such an injunction would have been non-existent but for EPA's failure to timely fulfill its procedural obligations under the ESA. Indeed, if EPA had expended as mush effort in compliance with the ESA as it has expended in resisting this action, the lawsuit might have been unnecessary.

Consistent with this presumption, injunctive relief is an appropriate remedy for violation of the ESA in absence of "rare or unusual circumstances such as interference with a long-term contractual relationship or "irreparable harm *to the environment*." *Id.* at 1384 n.11 (emphasis in original). The fact that EPA's violation of § 7(a)(2) is procedural does not change the balance of hardships that Congress struck in favor of endangered species because "[o]nly by requiring substantial compliance with the [ESA]'s procedures can we effectuate the intent of the legislature." *Id.* at 1384. As the Ninth Circuit emphatically explained in another case involving the United States Forest Service's failure to consult with the FWS with respect to the effects of the Service's approved timber road on the endangered Rocky Mountain Gray Wolf:

> If anything, the strict substantive provisions of the ESA justify *more* stringent enforcement of its procedural requirements, because the procedural requirements are designed to ensure compliance with the substantive provisions. The ESA's procedural requirements call for a systematic determination of the effects of a federal project on endangered species. If a project is allowed to proceed without substantial compliance with those procedural requirements, there can be no assurance that a violation of the ESA's substantive provisions will not result. The latter, of course, is impermissible.

Thomas v. Peterson, 753 F.2d 754, 764 (9th Cir. 1985) (citing *TVA v. Hill*, 437 U.S. 153 (1978)) (emphasis in original). The above cases make it apparent that in enacting the ESA, Congress expressly preferred the preservation of endangered species, deprived of the ability to protect themselves against the perpetual technological crusade of ever-expanding humankind, over the preservation of chemicals that have the potential to make extinction of those species imminent. This Court is not in the position to change that statutorily expressed congressional choice.

In addition to the above challenges, WSFB argues that the Court's January 22, 2004 Order should be vacated as non-compliant with the specificity requirement of Fed. R. Civ. P. 65(d).[4] WSFB contends

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[4] That rule provides:

> Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and

that the Order violates Rule 65(d) by (1) restricting actions of individual landowners who are not a party to this action, (2) containing unreasonably vague terms not comprehensible by an average landowner, and (3) impermissibly defining the scope of the injunction by reference to sources outside the Order's text. The Court finds each of those challenges without merit.

First, the January 22, 2004 Order does not compel any individual or entity other than EPA to take any action or abstain therefrom. The Order explicitly limits its reach to temporarily enjoining *EPA* from authorizing the use of certain pesticide active ingredients within a particular distance from the streams where threatened and endangered salmonids are found. Thus, the Order does not offend Rule 65(d)'s requirement that it must be binding only upon the parties to this action. The Order's only purpose is to remedy EPA's substantial violation of the ESA by failing to determine the effects of its approved pesticides on salmonids as opposed to limiting individual farming practices. The fact that the latter may occur as an incidental result of the former does not make the Court's imposed injunctive relief invalid; a conclusion to the contrary would make it impossible to remedy any action by an agency charged with the duty to issue licenses or set industry standards.

Second, the Order describes in excruciating detail the scope of the interim injunctive relief it grants. The Order specifically lists the pesticide active ingredients to which it applies. The Order sets precisely delineated buffer zones for aerial and ground applications of the products containing those ingredients. The Order provides a detailed explanation of the products, uses, and pesticide programs exempted from the injunction's scope. In light of those specific descriptions, WSFB's allegation that the

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> is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

Fed. R. Civ. P. 65(d).

Order is impermissibly vague is unfounded.[5]

Third, the Order's reference to the StreamNet and the U.S. Geological Survey databases in defining the geographical scope of the interim injunctive relief does not violate Rule 65(d) because that reference is essential to the precise and accurate description of waters that support salmonids. Although Rule 65(d) contains a technical requirement that the body of an order granting injunctive relief describe the acts sought to be restrained, the main purpose of Rule 65(d) is to provide the affected parties with "fair and precise notice of what the injunction actually prohibits." *Union Pac. R.R. v. Mower*, 219 F.3d 1069, 1077 (9th Cir. 2000) (quoting *Granny Goose Foods, Inc. v. Bhd. of Teamsters*, 415 U.S. 423, 444 (1974)). Moreover, the description required by Rule 65(d) needs only be reasonably specific. *See U.S. v. V-1 Oil Co.*, 63 F.3d 909, 913 (9th Cir. 1995) ("[The Ninth Circuit] will not set aside injunctions under Rule 65(d) 'unless they are so vague that they have no reasonably specific meaning.'") (citation omitted).

Here, the body of the January 22, 2004 Order clearly states that the interim injunctive relief applies to "Salmon Supporting Waters" in Oregon, Washington, and California, "defined as the area below the ordinary high water mark of all streams, lakes, estuaries, and other water bodies where salmon are ordinarily found at some time of the year." (January 22, 2004 Order at 3-4, Dkt. No. 224.) Further, based on the recommendations of both Plaintiffs and EPA (*see* Pls.' 2d Proposed Order at 3, Dkt. No. 221; EPA's Proposed Order at 3, Dkt. No. 207), to make the scope of the injunction more precise and narrowly drawn, the Order directs the parties to consult two comprehensive online databases that describe Salmon Supporting Waters in great detail and reflect relevant changes in the location of those aquatic bodies. Thus, the Order's internal description of the injunction's geographic scope supplemented by a reference to the sources making that description as precise as scientific data on salmonids' habitat

[5] WSFB contends that individual farmers are having difficulties in understanding the terms of the injunction. In this regard, the Court again emphasizes that because the January 22, 2004 Order enjoined EPA from authorizing the unrestricted application of certain pesticide active ingredients, it is EPA's duty to provide individual pesticide users with comprehensive instructions as to the Order's scope.

allows, clearly comports to the specificity requirement of Rule 65(d).

III. CONCLUSION

Intervenor-Defendants' current motions have failed to carry the heavy burden of demonstrating that the Court-ordered interim injunctive relief should be stayed pending resolution of Defendants' appeal of the Court's January 22, 2004 Order. Accordingly, Intervenor-Defendants' motions to stay (Dkt. Nos. 241 and 252) are hereby DENIED.

SO ORDERED this 18th day of May, 2004.

/s/ John C. Coughenour
CHIEF UNITED STATES DISTRICT JUDGE